FILED
OCT 6 1992
OFFICE OF THE CLERK

No. 92-366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FLORA ANN RUWITCH, Trustee,
Irrevocable Trust Agreement of
WALLACE R. RUWITCH,
Petitioner,

vs.

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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REASONS WHY THE COURT SHOULD GRANT THE PETITION

I. THE COURT OF APPEALS' HOLDING WAS A PATENTLY IMPROPER APPLICATION OF THE GOVERNING MISSOURI LAW; RESPONDENT'S ARGUMENT TO THE CONTRARY RESTS ON A MISLEADING ATTEMPT TO READ OUT OF THE POLICY THE KEY PROVISIONS THAT MANDATE A POLICY CONSTRUCTION IN FAVOR OF PETITIONER.

The basic fallacy in Respondent's argument is shown by its misleading "Statement", which inexplicably directs the Court's attention to only one of the three policy clauses that are appli-

cable here. These clauses are contained in Parts I and II of the Application and on page 4 of the policy itself, and are attached as Appendix A. They read in part as follows.

From Part I of the Application:

> The statements contained here and in Part II of this application . . . are true to the **best of my knowledge and belief** . . . (Emphasis supplied).
>
> [N]o insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability **represented** in Parts I and II of this application. (Emphasis supplied).

Part II of the Application, the form used by William Penn where (as here) there was a physical examination of the applicant, contained the following:

> The statements and answers are true to the **best of my knowledge and belief** and are made for the purpose of inducing the Company to issue insurance on my life. (Emphasis added.)

Finally, the relevant language from the policy itself provides:

> . . . . A copy of the application is attached to the contract when issued; No statement will be used by us to void the contract or to defend against a claim presented under the contract, unless that statement is contained in the attached copy of the application. **Statements in the application will be considered representations and not warranties**. (Emphasis added.)

The Court of Appeals cited these three clauses, but then ignored the effect of the limited knowledge and belief representation and the non-warranty clause and construed what it deemed was a "good health" clause as if it were a warranty. In doing so the Court of Appeals totally ignored two out of the three relevant clauses and missed entirely the fact that the "good health" clause

was only based upon what was "represented". The Court's construction that the "good health" clause is an absolute one is totally inconsistent with these limiting clauses.

II. THE COURT OF APPEALS FAILED TO APPLY THE ENTIRE BODY OF MISSOURI LAW AS REQUIRED BY *ERIE RAILROAD; SALVE REGINA* GAVE IT NO LICENSE TO SUBVERT THE LANGUAGE OF THIS POLICY BASED UPON A TOKEN DE NOVO REVIEW.

While the Court of Appeals purported to apply the *de novo* review standard prescribed in *Salve Regina*[1], it wholly failed to follow the underlying rule of *Erie Railroad*[2] that in a diversity case it is incumbent upon Federal Courts to employ the entire body of State law applicable to the particular controversy.

It ignored the non-warranty and knowledge and belief cases decided by the Missouri Appellate Courts. It also ignored the significant rulings in the District Court by the Honorable George G. Gunn. Judge Gunn was a former Justice of the Missouri Court of Appeals (Eastern District) and the Missouri Supreme Court. Respondent is in error when it states that Judge Gunn did not issue any opinion in the case. He did. Attached at Appendix B is a copy of the Opinion he rendered in overruling the Motions for Summary Judgment filed by the parties, including Respondent's Motion based upon its construction of the "good health" clause in the policy. Judge Gunn also overruled Respondent's motion for a directed verdict and its motion for judgment N.O.V., which were both based upon its improper warranty construction of the "good health" clause.

Respondent has totally eschewed any discussion of this Court's applicable decisions in *Ruhlin* and *Stoner*,[3] which established

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[1] *Salve Regina College v. Russell*, __ U.S. __ , 111 S.Ct. 1217 (1991).

[2] *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938).

[3] *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202 (1938). *Stoner v. New York Life Insurance Company*, 311U.S. 464 (1940).

that a basic function of this Court is to correct error where a Court of Appeals abrogates its duty under *Erie*. Here, this Court could either choose to reverse *per curiam* or to remand the case to the Court of Appeals for proper review, but this Court's obligation to correct the Court of Appeals' failure to follow and apply *Erie* is clear.

This Court might determine that the words "*de novo*" used in *Salve Regina* give the courts of appeals too much latitude and that it is time to establish that the rules of *Erie Railroad*, *Ruhlin* and *Stoner* are alive, well, and binding upon the courts of appeals. A court of appeals, especially a panel consisting of three judges who were not practicing lawyers or trial judges in the applicable state, should give at least *some* weight to a ruling below, especially one by a District Judge, who has been a Judge not only on the State's Appellate Court but a Justice of the State's Supreme Court.

III. THE EIGHTH CIRCUIT'S CONSTRUCTION OF THE "GOOD HEALTH" CLAUSE IS NOT SUPPORTED BY THE SELECTED CASES CITED BY RESPONDENT AND THE COURT.

In each of the four cited cases relied upon by the Court of Appeals and cited by the Respondent, there was a classic "good health" clause which stated just that — that the insured warranted that he was in good health at the time the policy was delivered.[4] In *Kirk*, for example, the good health provision provided that:

> No obligation shall be assumed by the Company prior to the date hereof nor unless on said date the insured is alive and in sound health. Should the proposed insured not be alive

[4] *Kirk v. Metropolitan Life Insurance Co.*, 81 S.W.2d 333, 343 (Mo. 1935); *Lipel v. General American Life Insurance Co.*, 192 S.W.2d 871 (Mo.App. 1946); *Mahn v. American Life & Accident Insurance Co.*, 390 S.W.2d 573, 576 (Mo.App. 1965); *Security Benefit Life Insurance Co. v. Jackson*, 318 F.2d 846, 850 (8th Cir. 1963).

> or not be in sound health on the date hereof, any amount paid to the Company premiums hereon shall be returned.

Id. at 335. The Supreme Court of Missouri noted that its ruling was based upon the absolute policy language:

> The insurer agreed to assume liability only upon condition that the insured should *be*, not merely believe herself to be, in sound health when the policy was issued, and the premium was fixed on that basis.

Id. at 343. This obvious distinction was ignored or overlooked by the Court of Appeals.

In *Lipel*, the Court pointed out the following concerning the good health clause:

> In the application, he was asked, "Are you now in good health?" to which he answered, "Yes"; he was further asked if he had cancers, tumors or ulcers of any kind, to which he answered "No".

Id. at 875. The court further noted that: "The application on October 31, 1942, represented that Joseph H. Lipel was in good health and had never suffered from cancer." *Id.* at 876.

Mahn and *Jackson* are similarly distinguishable. None of those cases contain the three relevant clauses in this policy: (1)that the insured's statements about his health were based only upon the "best of his knowledge and belief", (2)that the clause itself was based upon what he "represented" and (3)that the policy expressly provided that statements in the application would only be considered (by Respondent) as "representations and not warranties." Thus, when Respondent states (Br.6) that "Petitioner cannot distinguish any of these" cases, it is simply wrong.

The unreported District Court case in *William Penn Life Assurance Co. of America v. Brown Transfer and Storage, Inc.*, cited at pages 9 and 10 of Respondent's Brief is also totally inapplicable because the evidence there showed that the insured,

in submitting his final application, had actual knowledge of his malady.

IV. THE CASES CITED BY PETITIONER AND IGNORED BY THE COURT OF APPEALS ARE CONTROLLING AND REQUIRED RESPONDENT TO PROVE KNOWLEDGE.

Missouri law recognizes only two defenses that a life insurer can raise in this type of case: misrepresentation and breach of warranty or condition. It was the duty of the Court to determine whether the language used in the application is a representation or a warranty. *See, e.g., Cohen v. Metropolitan Life Insurance Co.*, 444 S.W.2d 498, 503 (Mo.App. 1969). Where there is a clause in the policy specifically negating warranty, that construction question should be an easy one. *See Houston v. Metropolitan Life Insurance Co.*, 97 S.W.2d 856, 862 (Mo.App. 1936), where the Court asked rhetorically what rule of construction would permit it to convert non-warranty language into a warranty or condition voiding the policy.

These cases are supported by the Missouri Supreme Court case of *Dixon v. Businessmen's Assurance Company of America*, 285 S.W.2d 619 (Mo. en banc 1955) cited on page 17 of the Petition and also *Toler v. Missouri Insurance Co.*, 243 S.W.2d 78 (Mo.App. 1951) and *Dyer v. Kansas City Life Insurance Co.*, 188 S.W.2d 758 (Mo.App. 1945), which were cited by Petitioner, but were also ignored by the Court of Appeals, as was the Eighth Circuit's own prior case of *Pyramid Life Insurance Co. v. Curry*, 291 F.2d 411 (8th Cir. 1961).

Recognizing that these cases are binding precedents, Respondent in its Brief (p.8) argues that there is somehow a difference between a "good health" defense and a misrepresentation defense, arguing that a representation relates to an applicant's past state of health whereas a "good health" clause (that Respondent claims makes knowledge irrelevant) concerns his condition at the time of the delivery of the policy. There are these problems

with that argument: (1) the application itself deals with past *and* the present; the representations were as of the time they were made; (2) the representations were expressly made only upon the insured's knowledge and belief; (3) this was the only state of health "represented" in the "good health" clause contained in the policy, and (4) the policy expressly provided that statements in the application were representations and not warranties.

V. THE CASES CONSTRUING POLICIES WITH "KNOWLEDGE AND BELIEF" PROVISIONS REQUIRE A SHOWING OF KNOWLEDGE OR FALSITY.

The express provisions of Respondent's own application only required the applicant to answer questions about his health based upon his knowledge and belief. That is why Respondent had Mr. Ruwitch examined by a physician. Accordingly, Mr.Ruwitch only represented that "to the best of his knowledge and belief", he did not have cancer. Respondent's "Statement" is inaccurate when it says on page 3 that Mr. Ruwitch "represented to Penn Life on Part II of his life insurance application that he did not have cancer." This statement is simply false. Mr.Ruwitch made no such representation. All he stated was that to the **"best of his knowledge and belief"**, he did not have cancer. Respondents misstatement permeates not only its Brief but also the Opinion of the Court of Appeals.

Respondent fails to cite a single case which holds or suggests that a "good health" clause based upon what the insured "represented" abrogates the express requirement of falsity under Missouri law or that Mr.Ruwitch's representation that "to the best of his knowledge and belief" he did not have cancer was a false statement. To the contrary, the cases cited by Petitioner unmistakably establish that this requirement of falsity applies regardless of whether the case is treated as a warranty case or a misrepresentation case. *See, e.g., Dixon v. Business Men's Assurance Co.*, 365 Mo. 580, 285 S.W.2d 619 (1985); *Schuetzel v. Grand Aerie Fraternal Order of Eagles*, 164 S.W.2d at 139;

New York Life Insurance Company v. Calhoun, 97 F.2d 896, 898 (8th Cir. 1938). *See also* cases cited in the Petition, pages 18-19.

Respondent attempts to avoid this clear requirement of falsity by simply ignoring it. If the *Erie* doctrine has any meaning, it clearly requires that a defendant in asserting an affirmative defense must satisfy each and every necessary element in order to prevail on that defense. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533 (1948) ("Since that cause of action is created by local law, the measure of it is to be found only in local law. It carries the same burden and is subject to the same defenses in the federal court as in the state court.").

Erie required that Respondent prove that Mr. Ruwitch made a material statement in the application that was false, *i.e* a representation that was contrary to his knowledge and belief. There was no such evidence. The representations of Mr. Ruwitch were true. When his tumor was ultimately discovered his doctors were surprised and he and his family were devastated.

VI. PETITIONER HAS NOT WAIVED HER ARGUMENT THAT AT THE VERY LEAST THE POLICY IS AMBIGUOUS AND TO AVOID A FORFEITURE THE POLICY UNDER MISSOURI LAW MUST BE CONSTRUED IN FAVOR OF PETITIONER.

Recognizing perhaps the merit of Petitioner's argument that the Court of Appeals' ruling construes any ambiguity in the policy in favor of the insurer rather than the insured, in contravention of well-established Missouri law, Respondent argues without basis that this contention was waived because it was not presented to the District Court. In fact, Motions for Summary Judgment were filed and both sides claimed that the policy was clear in accordance with their particular construction. In that briefing, however, Petitioner cited the *Cohen*, *Schuetzel* and *Dyer* cases cited on pages 21 and 22 of this Petition, and the applicable rules of construction that under Missouri law an insurance policy is strictly construed against the insurer, especially when the insurer seeks to avoid coverage or enforce a

policy forfeiture provision. These cases were also cited in Petitioner's Memorandum in Opposition to Respondent's Motion for Judgment N.O.V.

In the Court of Appeals, these cases and others were cited in support of this well-established Missouri rule that ambiguity in an insurance policy must be construed against the insurer. The Court of Appeals, without discussion of any of these cases, ignored this rule and stood the law on its head when it in effect held that this policy should be construed in favor of the insurer. Thus, Petitioner's valid argument was preserved at all stages of the proceeding.

VII. RESPONDENT HAS IGNORED THE FACT THAT THE OPINION OF THE EIGHTH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE ELEVENTH CIRCUIT CONSTRUING THIS SAME POLICY.

Respondent's cryptic dismissal (Br. 11) of the case of *William Penn Life Insurance Co. v. Sands*, 912 F.2d 1359 (11th Cir. 1990) does not explain the fact that two federal courts of appeal now have rendered two diametrically opposed Opinions construing the same insurance policy. The *Sands* case requires proof that the insured had knowledge of the subject malady because of the "knowledge and belief" qualifier. The Court of Appeals here casually held that knowledge is irrelevant and that William Penn had no duty to prove falsity despite the presence of the very same "knowledge and belief" qualifier. This is not just a direct conflict on the law, but a judicial conflict on the meaning of the same insurance policy.

VIII. RESPONDENT'S ARGUMENT BASED ON CONSERVATION OF JUDICIAL RESOURCES IS WITHOUT MERIT.

Respondent's unsubstantiated prediction (Br. at 4) that by this Court's correction of this grave injustice there will be a proliferation of petitions to review state law questions rings hollow. The

opposite is true. Granting certiorari here to review the questions presented by Petitioner will send a strong message to the Court of Appeals, reminding them of their duty under the *Erie Railroad* case to apply the entire body of state law in diversity cases and to not render decisions based upon a misconstruction of a contract purportedly based upon some, but not the entire body of the applicable state law. This will reduce the tendency of insurers to forum shop and file their meritless declaratory judgment suits in the federal courts.

CONCLUSION

The decision of the Court of Appeals is simply wrong. This grave injustice should be remedied. The Constitution and the Congress have granted the federal courts diversity jurisdiction. This Court has mandated in *Erie* that the federal courts follow and properly apply the entire body of state law in these cases. The outright reversal of the Court of Appeals in this case is an abrogation of that rule. This Court is the only forum Mrs. Ruwitch has to obtain the simple justice to which she is entitled.

The Writ should issue.

Respectfully submitted,

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APPENDIX A

P -2T I Application for life insurance to: WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

HOME OFFICE INDIANAPOLIS, INDIA
AD INISTRATIVE OFFICE 2 CORPORATE PLACE SOUTH PI -TAWAY N J 08854

Assigned Policy No. _____

COMPLETE FOR ALL POLICIES (Please Print) –

1. a. NAME
FIRST WALLACE
MIDDLE R
LAST RULITCH

Male ☒ Female ☐

b. ☐ Single ☒ Married ☐ Divorced ☐ Widowed ☐ Separated

c. DATE OF BIRTH (month day year): 10 29 38
d. AGE (nearest birthday): 50
e. BIRTHPLACE (state): ILL (country): USA

f. SOCIAL SECURITY OR TAX NO. 334-38-2517

2. SEND ALL MAIL TO OWNER AT ADDRESS IN ☐ 3a ☐ 3b ☐ 9

3. a. RESIDENCE - NUMBER AND STREET
212 NANTUCKET LANE

CITY OR TOWN: STILLWATER | STATE: MO | ZIP CODE: 63011 3124

Questions 3b & c apply to proposed insured if age 15 or over.
To owner or payor if proposed insured under age 15.

b. BUSINESS ADDRESS With present employer .... 0 ..... yrs.
Employer DCW SCREW PRODUCTS, INC.
No. & Street 3624 S. BROADWAY
City ST. LOUIS State MO Zip 63111
Nature of Business STEEL MACHINE PRODUCTS

c. OCCUPATION (All, if more than one)
PRESIDENT
Duties (Describe) MANAGEMENT - CEO

4. HAS ANY PERSON PROPOSED FOR INSURANCE:

	Yes	No
a. engaged or intend to engage in hang gliding, racing, scuba diving, sky diving?	☐	☒
b. had driver's license restricted, revoked or suspended? If Yes, give driver's ID #	☐	☒
c. other life insurance applications pending?	☐	☒
d. ever had life or health insurance declined, modified or rated?	☐	☒
e. any intention of traveling or residing outside the country?	☐	☒
f. any intention of replacing or changing any life insurance or annuity policy in force in this or any other company?	☐	☒
If any of 4a through 4f are answered Yes, give full details in REMARKS		
g. taken within five years or intend to take flights other than as a fare-paying passenger on scheduled airlines?	☐	☒
If Yes, complete Aviation Questionnaire		
5. Have you smoked cigarettes in the past 12 months?	☐	☒

6. a. PLAN PENN TERM II - NON SMOKER

b. AMOUNT $ 2,000,000 ☐ NON-PAR ☐ PAR

c. PREMIUMS PAYABLE ☒ Annual ☐ Semi-annual ☐ Quarterly
☐ Auto Bank Ch. ☐ Mo. ☐ Other _____

d. AUTOMATIC PREMIUM LOAN, if available ☐ Yes ☐ No

e. 10 YEAR LEVEL TERM RIDER – AMOUNT $ _____
FAMILY INC. RIDER _____ (YRS.) $ _____ MONTHLY INC
OTHER BENEFITS (Check Those Desired)
☐ Accident Indemnity ☐ Payor Death and Disability
Amount $ _____ ☐ Waiver of Premium
☐ Family Plan Rider ___ Units ☐ Children's Rider _____ Units
☐ Annual Renewable Term Rider
☐ Guaranteed Purchase Option – Amount $ _____
☐ Other _____

f. IF PARTICIPATING, USE OF DIVIDENDS (If not checked, paid u additions automatic)
☐ Cash ☐ Deposit at Interest
☐ Reduce Premium ☐ Paid Up Additions
☐ One Year Term - Cash Value Only ☐ One Year Term

7. LIFE INSURANCE IN FORCE ON PROPOSED INSURED

Name of Company	Issue Year	Amount	ADB
WILLIAM PENN	1986	None	
United Benefit	1986	165,000	

8. BENEFICIARY for benefits payable upon the death of the proposed insured

	Full Name	Age	Relationship
Primary:	FLORA ANN RULITCH, TRUSTEE, UNDER IRREVOCABLE INSURANCE TRUST AGREEMENT OF WALLACE R. RULITCH DATED 6-2-93		
~~Contingent~~:			

9. NAME OF OWNER if other than proposed insured — Relationship
FLORA ANN RULITCH, TRUSTEE, UNDER IRREVOCABLE INSURANCE TRUST AGREEMENT OF WALLACE R.
Address RULITCH DATED 6-2-93

10. AMOUNT PAID WITH THIS APPLICATION: $ _____
Please read receipt ☐ NONE

11. ☐ ALTERNATE POLICY ☐ ADDITIONAL POLICY
Plan _____ Amt. $ _____ ☐ Par ☐ Non Par
☐ Additional Benefits: ☐ W.P. ☐ ADB ☐ OTHER:

REMARKS:

Complete only if medical examination is to be taken.

Have you consulted a physician within the last five years? If answer is "Yes," give dates, names and addresses and reason for consultations. Yes ☒ No ☐
Annual physical last checkup 3-93 by Dr Llewellyn Sale Jr.

IN CONNECTION WITH THIS APPLICATION FOR INSURANCE, IT IS UNDERSTOOD AND AGREED THAT:

The statements contained here and in Part II of this application and any supplements thereto, copies of which shall be attached to and made a part of any policy to be issued, are true to the best of my knowledge and belief and are made to induce the Company to issue an insurance policy. No agent or other person has power to make, modify, or discharge any contract of insurance.

Except as may be provided in a duly issued Conditional Receipt bearing the same number as this application, no insurance shall take effect unless and until the policy has been physically delivered and the first full premium paid during the lifetime of the insured and then only if the person to be insured is actually in the state of health and insurability represented in Parts I and II of this application.

A-MO— 0520

DECLARATION

I have carefully read the receipt and understand and agree to the terms thereof including the conditions under which a limited ... become effective prior to policy delivery. I have received the MIB Disclosure and Fair Credit Reporting Act notices.

PLAINTIFF'S EXHIBIT 35

City St Louis State of Missouri Signature of Proposed Insured W. R. Rulitch

Date 5-1 19 93 Signature of Spouse (Spouse Rider only) _____

Witness Linda Hoenstine Signature of Owner (if a corporation) Flora Ann Rulitch, Trust

002074

WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

MEDICAL
PART II OF APPLICATION TO WILLIAM PENN LIFE ASSURANCE COMPANY OF AMERICA

EXAMINATION TO BE MADE IN PRIVATE. PLEASE READ ALL QUESTIONS TO APPLICANT.
ANSWERS TO BE RECORDED BY THE MEDICAL EXAMINER IN HIS OWN HANDWRITING.

1. PROPOSED INSURED: Wallace Ruwitch — A. Height: 5'10" — B. Weight: 144 — C. Change in weight in past 12 months (Give reason) lbs. Loss _____ Gain _____ Same

D. Name of Personal Physician: L. Sale, M.D. — Physician's Address: 4544 Forest Park St Louis Mo — Date and reason last consulted - if none, so state: 1yr. ago — Physic

Questions 2-8 are answered to the best of my knowledge and belief.	YES	NO	Give full details if any answer to Questions 2-8 is Yes Dates, Doctors' Names & Addresses.
2. Have you any physical defects?	☐	☑	
3. Have you ever:			
a. received treatment or joined an organization for alcoholism or drug addiction; or used habit-forming drugs other than as prescribed by a licensed physician?	☐	☑	
b. applied for or received disability benefits from any source?	☐	☑	
4. Have you ever had:			
a. convulsions, paralysis, neuritis, nervous breakdown, dizziness, fainting spells, migraine headaches, nervous or mental disorder?	☐	☑	
b. high blood pressure, chest pain, shortness of breath, palpitation, heart attack, disorder of heart or blood vessels?	☐	☑	
c. hemorrhage, chronic hoarseness or cough, asthma, tuberculosis, spitting of blood, emphysema, disorder of respiratory system?	☐	☑	
d. chronic indigestion, ulcer, hernia, colitis, intestinal bleeding, disorder of stomach, gall bladder, liver, digestive or abdominal organs?	☐	☑	
e. kidney stone, diabetes, sugar, albumen, pus, or blood in urine, disorder of kidneys, bladder, genito-urinary organs?	☐	☑	
f. rheumatic fever, arthritis, gout, disorder of muscles, bones, joints or spine?	☐	☑	
g. impairment of vision or hearing or disease of eyes, ears, nose or throat?	☐	☑	
h. tumor, cancer, venereal disease, disorder of blood, skin, thyroid or other glands?	☐	☑	
i. treatment or observation in any hospital or institution? (past 5 years)	☐	☑	
j. X-rays, electrocardiograms, blood studies or other diagnostic tests? (past 5 years) When, why, by whom, with what results?	☑	☐	3j) X-Ray Blood, EKG. Dallas Med 1958 Dr. L. Sale
k. treatment or consultations with any physicians or practitioners, other than as stated above (past 5 years)? Give details.	☑	☐	2k) Prostatic check — Dr. Lupon Jamestown
5. Have you in the past 5 years been advised to have or do you contemplate a surgical operation?	☐	☑	
6. Are you now pregnant? (If so, how many months)	☐	☑	
7. Have you smoked cigarettes in the past 12 months?	☐	☑	

8. Provide family history — Mother ☑ Alive at age ☐ Deceased at age Reason?
Father ☑ Alive at age ☐ Deceased at age Reason?

The statements and answers are true to the best of my knowledge and belief and are made for the purpose of inducing the company to issue insurance on my life.

Signed at St. Louis (City) Mo (State) — Proposed Insured: Wallace Ruwitch

Date 3/10/62 — Witness: Eugene Beauchamp M.D. (Examiner) AMA

MP-1000/62

Definitions

INSURED is the person whose life the contract insures, and is named in the Schedule.

WE, US, OUR refer to William Penn Life Assurance Company of America (the Company).

YOU, YOUR refer to the Owner named in the Schedule, and may be someone (or an organization) other than the person whose life is insured.

DEATH BENEFIT means the Face Amount shown in the Schedule, if the Insured dies while the policy is in full force; the amount may be changed by other provisions of the contract.

BENEFICIARY is the person or entity named to receive the Death Benefit.

POLICY DATE is shown in the Schedule, and is the date on which the contract goes into effect. Contract years and anniversaries will be determined from the Policy Date.

AGE is shown in the Schedule, and is the Insured's Age as of the nearest birthday, on the Policy Date.

ATTAINED AGE refers to the Insured's Age on the Policy Date, plus the number of years and whole months which have passed since the Policy Date.

DATE OF ISSUE is the date the policy is issued by the Company.

PAYEE refers to any person or entity to whom payments are made under the contract's Payment Options.

General Information

Entire Contract

This is a contract between you and us. Read your entire contract carefully. The contract, any attached riders and endorsements, and the written application make up the entire contract. A copy of the application is attached to the contract when issued. No statement will be used by us to void the contract or to defend against a claim presented under the contract, unless that statement is contained in the attached copy of the application. Statements in the application will be considered representations and not warranties.

The legal consideration for this contract is the application and the payment of premiums as provided in the contract.

Modification

This contract cannot be changed except through a written agreement signed by one of our officers.

Non-Participation

This contract does not provide for the payment of dividends, and does not share in the gains or losses of the Company.

Adjustment for Incorrect Age or Sex

If the Insured's age or sex is misstated, we will adjust all benefits. The benefits will equal those the premiums paid would have provided at the true age and sex. The rates in effect when the contract was issued will be used in making the adjustment.

Suicide

If the Insured dies by suicide within 2 years from the Date of Issue of this contract, the only death benefit will be the sum of premiums paid. The amount will be paid in a single sum. (If this contract is delivered to a Citizen of Missouri, the suicide limitation applies only if we can prove that the Insured intended suicide at the time of application.)

Time Limit on Contests (Incontestability)

We cannot contest this contract after it has been in force, during the Insured's lifetime, for 2 years from the Date of Issue, except for failure to pay premiums. This rule does not apply to any attached riders providing benefits for total and permanent disability and additional Accidental Death Benefits.

(In South Carolina, our right to contest any benefits is limited to 2 years from the Date of Issue.)

(In Wisconsin, Waiver of Premium and Accidental Death Benefits are contestable after 2 years, but only for fraud.)

APPENDIX A

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 90-1709C(6)
(Consolidated With No. 90-1312C(A)

FLORA ANN RUWITCH, Trustee,
Irrevocable Insurance Trust Agreement of
Wallace R. Ruwitch,
Plaintiff,

vs.

WILLIAM PENN LIFE ASSURANCE
COMPANY OF AMERICA,
Defendant.

MEMORANDUM

[Filed: March 29, 1991]

Plaintiff Ann Ruwitch brings this action seeking to recover on a two million dollar, convertible term life insurance policy issued by defendant William Penn Life Assurance Company of America. In her petition plaintiff alleges that she has performed all conditions precedent for recovery under the policy, but defendant, by refusing to pay to plaintiff the two million dollars owed under the policy, has breached its insurance obligation to pay the policy proceeds. Plaintiff further alleges that defendant's refusal to pay the proceeds under the terms of the policy is unreasonable, willful and without just cause or excuse and defendant's refusal to pay constitutes a vexatious refusal to pay under § 375.420, Mo. Rev. Stat. (1986).

Plaintiff has moved for summary judgment on the grounds that the pleadings, defendant's discovery, responses, documents produced and depositions taken in this case show that there is no

genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law. Defendant opposes this motion by asserting that there are genuine issues of material fact concerning the issues of the material omission of fact from the May 1, 1989 application for insurance and the "continuing good health" provision of the policy.

Defendant has moved for summary judgment on the grounds that the pleadings, depositions and documents produced in this case demonstrate that there are no genuine issues of fact in dispute as to the falsity of Mr. Ruwitch's statement in the May 1, 1989 application, as to his knowledge of its falsity and as to reliance upon it by defendant and as to the good health clause. Plaintiff opposes this motion.

Upon review of the pleadings, the discovery responses, documents produced and depositions taken in this case, the Court concludes on the record currently before the Court there remain material factual issues which are genuinely disputed concerning the May 1, 1989 reissuance application and the representations made by Mr. Ruwitch in that policy application. Accordingly, plaintiff's motion for summary judgment and defendant's motion for summary judgment will be denied.

Dated this 29th day of March, 1991.

/s/ George Gunn
UNITED STATES
DISTRICT JUDGE